

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A  
JUDGE: CYNTHIA A. HOLLOWAY  
NO.: 00-143  
\_\_\_\_\_ /

Florida Supreme Court  
Case No.: SC00-2226

MOTION TO COMPEL

COMES NOW, the HONORABLE CYNTHIA A. HOLLOWAY, by and through her undersigned counsel and hereby files this Motion to Compel respectfully requesting the Florida Supreme Court to direct Special Counsel of the Judicial Qualifications Commission to adhere to Florida Judicial Qualifications Commission Rule 12(b) by disclosing witness statements taken by its investigator and any other evidence upon which formal charges are based.

(1) Pursuant to Florida Judicial Qualifications Commission Rule 12(b), Judge Holloway, through her undersigned attorney, provided a written demand for the "names and addresses of all witnesses whose testimony the Special Counsel expects to offer at the hearing, together with copies of all written statements and transcripts of testimony of such witnesses in the possession of the counsel of the Investigative Panel which are relevant to the subject matter of the hearing and which have not previously been furnished." (See Demand for Rule 12(b) Materials, dated November 7, 2000, attached as Exhibit A).

(2) In response to Judge Holloway's request, Special Counsel,

Beatrice Butchko, provided a list of nineteen potential witnesses, transcripts of testimony given by Judge Holloway, a deposition transcript of John Yaratch and witness affidavits originally submitted by Judge Holloway with her Answer to Notice of Investigation. In addition, Special Counsel provided a typed written statement purported to be of Sharron K. Cosby dated March 3, 2000. The statement is unsigned. However, Special Counsel did not disclose any statements of the remaining JQC witnesses. (See Special Counsel's Potential Witness List and Catalogue of Sworn Statements and/or Transcripts, dated December 8, 2000, attached as Exhibit B).

(3) On January 3, 2001, Judge Holloway again made a written request for disclosure of the remaining witness statements citing to Rule 12(b). (See attached as Exhibit C).

(4) In Special Counsel's response dated January 16, 2001, she acknowledged that the JQC has possession of typed witness interviews conducted by its investigator. (See attached as Exhibit D). Moreover, Special Counsel conceded that these interviews or statements were given at the direction of Mr. Thomas C. MacDonald, Jr., who was acting as the General Counsel for the Investigative Panel in this proceeding. However, Special Counsel refused to disclose the witness statements, citing to the discovery provisions contained in the Florida Rules of Civil Procedure. At least one listed witness, Detective Yaratch, has refused to voluntarily speak

to counsel for Respondent. (See letter from Scott Tozian to Detective Yaratch dated February 15, 2001 and attached as Exhibit E).

(5) On January 31, 2001, Respondent filed a Motion to Compel with the Judicial Qualifications Commission Hearing Panel requesting compliance with Florida Judicial Qualifications Commission Rule 12(b). (See Respondent's Motion to Compel, attached as Exhibit F).

(6) Judicial Qualifications Commission Special Counsel, Ms. Beatrice Butchko, served her response on February 15, 2001, claiming that the witness statements were protected by the "work product doctrine" and should not be disclosed pursuant to Florida Rule of Civil Procedure 1.280. (See Judicial Qualifications Commission's Response to Judge Cynthia A. Holloway's Motion to Compel, attached as Exhibit G).

This response fails to address or even reference Rule 12(b). The JQC's reliance on the Florida Rules of Civil Procedure to justify its refusal to provide witness statements is misplaced because Florida Judicial Qualification Commission's Rule 12(b) controls this issue. While the Florida Rules of Civil Procedure govern the majority of the procedure in Judicial Qualifications Commission proceedings, Rule 12, titled "Procedure," was specifically promulgated to address procedural discovery aspects that are unique to JQC prosecutions. One of these unique procedural requirements is the Special Counsel's obligation to disclose witness statements.

Fla. Jud. Qual. R. 12(b).

The Florida Rules of Civil Procedure should not be read to modify or abrogate the Florida Judicial Qualifications Rules. In fact, Rule 12(a) creates an exception to the application of Florida Rules of Civil procedure when such an application is "inappropriate or otherwise provided in these rules." Since Rule 12(b) otherwise provides for the discovery obligation to disclose witness statements, it is inappropriate to apply or accept Special Counsel's discovery obligation argument under the Florida Rules of Civil Procedure.

(7) The Chairman of the Judicial Qualifications Hearing Panel denied Respondent's Motion to Compel on February 20, 2001. (See Order on Motions for Protective Order and to Compel, attached as Exhibit H). The Order stated that its ruling was "without prejudice to a post-deposition attempt to demonstrate "good cause" under Rule 12(b) and In re: Graziano, 696 So. 2d 744 (Fla. 1997)."

(8) It is respectfully submitted that the Hearing Panel's Order is contrary to Florida Judicial Qualifications Commission Rule 12 and with a prior decision of the Florida Supreme Court. Fla. Jud. Qual. Comm'n R. 12(b); In re Graziano, 696 So. 2d 744 (Fla. 1997). In fact, this ruling evinces a misapplication of the plain language of Rule 12(b) by imposing a "good cause" showing requirement upon the judge where one does not exist.

(9) Rule 12(b) imposes an obligation on Special Counsel to

"promptly" disclose upon written request:

The names and addresses of all witnesses whose testimony the Special Counsel expects to offer at the hearing, together with copies of all written statements and transcripts of testimony of such witnesses in the possession of the counsel or the Investigative Panel which are relevant to the subject matter of the hearing and which have not previously been furnished, except those documents confidential under the Constitution of the State. When good cause is shown this rule may be waived.

Fla. Jud. Qual. Comm'n R. 12(b) (*emphasis added*). Special Counsel acknowledges that the witness statements in her possession were provided to Mr. Thomas C. MacDonald, Jr., General Counsel, "for use in determining the existence of probable cause needed before the Formal Charges against Judge Holloway were filed." (See Judicial Qualifications Commission's Response to Judge Cynthia A. Holloway's Motion to Compel, p. 3, para. 4 [hereinafter JQC Response]). Since the witness statements are in the possession of Special Counsel and are relevant to the subject matter of the Judicial Qualifications Commission proceeding (i.e., the basis for formal charges), Rule 12(b) clearly mandates disclosure.

The unambiguous language of Rule 12(b) does not include any requirement that the responding judge establish "good cause." Rather, Rule 12(b) mandates Special Counsel provide these statements but allows for a waiver of the rule if "good cause" is shown. Judge Holloway is not seeking to waive Rule 12(b); Judge Holloway is requesting this Court to enforce the Special Counsel's discovery

obligations under Rule 12(b). The "good cause" requirement falls upon Special Counsel to show why the statements should not be provided; no such showing was attempted, let alone made. Thus, the ruling that Respondent may show good cause in a post-deposition attempt to obtain this discovery is clearly erroneous and in fact, illogical. Neither timing considerations nor a showing of cause by Respondent are appropriate under Rule 12(b).

(10) Moreover, this Court has previously held that "discovery pursuant to rule 12(b) allows an accused judge to have full access to the evidence upon which formal charges are based." In re Graziano, 696 So. 2d 744, 751 (Fla. 1997). (*emphasis added*). In fact, the Graziano Court determined that these liberal discovery rights are necessary to counterbalance the continuing confidentiality of the original complaint. Id. at 751-752. Moreover, there is no indication that a responding judge show "good cause" in order to activate that judge's right to "full access to the evidence." See Id.

The only exception to the accused judge's entitlement to full disclosure of the written statements is any statement contained in a document that is confidential under the Constitution of the State. Fla. Jud. Qual. Comm'n R. 12(b). There is no allegation or any finding that the witness statements sought to be disclosed are confidential under Florida's Constitution.

(11) It is respectfully submitted that the search for truth is best served by compliance with Rule 12(b) which is to be broadly interpreted in favor of the production of these statements. It is incomprehensible that potentially exculpatory evidence may be shielded from discovery by the hearing panel's interpretation of Rule 12(b).

WHEREFORE, and by reason of the foregoing, the Honorable Cynthia A. Holloway respectfully requests this Court to enter an order compelling the Special Counsel to produce all witness interviews conducted by the Judicial Qualifications Commission investigator in accordance with Florida Judicial Qualification Commission Rule 12(b) and the rulings of the Florida Supreme Court.

Respectfully submitted,

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SCOTT K. TOZIAN, ESQUIRE  
SMITH & TOZIAN, P.A.  
109 North Brush Street, Suite 150  
Tampa, Florida 33602  
(813) 273-0063  
FL Bar# 253510  
Attorneys for the Honorable  
Cynthia A. Holloway

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MICHAEL S. RYWANT, ESQUIRE  
RYWANT, ALVAREZ, JONES, RUSSO &  
GUYTON, P.A.  
109 N. Brush Street, Suite 500  
P. O. Box 3283  
Tampa, Florida 33601  
(813) 229-7007  
FL Bar #240354

Attorneys for the Honorable  
Cynthia A. Holloway

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_\_ day of February, 2001, the original of the foregoing Motion to Compel has been furnished by UPS overnight delivery to: The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 with true and correct copies by U.S. Mail and facsimile transmission to: Beatrice A. Butchko, Esquire, Kaye, Rose & Maltzman, LLP, One Biscayne Tower, Suite 2300, 2 South Biscayne Boulevard, Miami, Florida 33131; and by U.S. Mail to John Beranek, Esquire, General Counsel, Ausley & McMullen, Washington Square Building, 227 Calhoun Street, P. O. Box 391, Tallahassee, Florida 32302 and Honorable James R. Jorgenson, Chair, Hearing Panel, Third District Court of Appeals, 2001 S.W. 117<sup>th</sup> Avenue, Miami, Florida 33175-1716.

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SCOTT K. TOZIAN, ESQUIRE